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No. 84-714 (9)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

District of Columbia Board of Parole, et al.,

Petitioners,

v.

Roosevelt Brandon,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Motion for Leave to Proceed
In Forma Pauperis

Respondent Roosevelt Brandon hereby moves for leave to proceed in forma pauperis in the above-captioned action.

1. As stated in the accompanying affidavit, respondent Roosevelt Brandon, an inmate in Lorton Correctional Complex, is unable to pay the costs of responding to the petition for certiorari. He has been incarcerated for most of the past 19 years and has no significant assets.

2. Mr. Brandon was granted leave to proceed in forma pauperis in the United States District Court for the District of Columbia in Civil Action No. 83-00007, and by the United States Court of Appeals for the District of Columbia

14/42

Circuit in No. 83-1100, the decision on which the writ of certiorari is sought.

Respectfully submitted.

Gerald Goldman
Peter A. Barnes
Donna E. Patterson

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(202) 626-6200

Attorneys for Respondent
Roosevelt Brandon

November 1984

No. 84-714

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1984

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DISTRICT OF COLUMBIA BOARD OF PAROLE, et al.,

Petitioners,

v.

ROOSEVELT BRANDON,

Respondent.

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

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AFFIDAVIT OF RESPONDENT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

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I, Roosevelt Brandon, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, or to print the briefs herein, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to respond to the petition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition are true.

1. Are you presently employed?

Answer: No. I am an inmate at Lorton Correctional Complex.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: No.

3. Do you own any cash or checking or savings account?

Answer: I have a small savings account at the Industrial Bank of Washington.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: When I was employed at Lorton I sent most of my pay to help support my son, Roosevelt Brandon, Jr., who currently resides with his grandmother in South Carolina.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Roosevelt Brandon

Roosevelt Brandon

SUBSCRIBED AND SWORN TO before me this ____ day of November, 1984.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor, and submit briefs in typewritten form.

15 November 84
Emily M. Jeffries
11/8/84

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

# BRIEF FOR RESPONDENT IN OPPOSITION

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November 1984

## Issue Presented

Whether the Court of Appeals correctly decided that, under the liberal rules of construction applied to *pro se* pleadings, the complaint in this case is not frivolous within the meaning of 28 U.S.C. § 1915(d) and thus cannot be dismissed *sua sponte* prior to service on the defendants?

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# BRIEF FOR RESPONDENT IN OPPOSITION

## STATEMENT

The petitioners in this case ask the Court to address two substantive questions concerning the right of prisoners to challenge parole decisions. In their eagerness to attack the decision of the Court of Appeals, however, the petitioners ignore what was actually decided and the procedural posture in which this case now rests.

This action was initiated by a pro se complaint. The District Court granted Brandon leave to proceed in forma pauperis and then dismissed the complaint sua sponte before it was served on the defendants, stating only:

> "Dismissed. States no cause of action. Parole Board is completely justified in getting all the information it can get on a prisoner who has been convicted of murder and rape while armed."

The Court of Appeals granted Brandon leave to proceed on appeal in forma pauperis and appointed counsel for him. After full briefing and argument, the Court of Appeals reversed the sua sponte dismissal and remanded for further proceedings.

The decision of the Court of Appeals was not a judgment on the merits of Brandon's claims. It was not even a decision that the complaint stated a claim that could survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The only issue decided by the Court of Appeals was that, under the liberal rules of construction applied to pro se pleadings, the complaint in this case was not "frivolous" within the meaning of 28 U.S.C. § 1915(d) and, therefore, could not be dismissed sua sponte prior to service on the defendants. The panel decision was unanimous, and even the two judges who dissented from the Court of Appeals' denial of rehearing en banc agreed that the complaint was not frivolous and should not have been dismissed. (Pet. App. at 20a.)

Despite the petitioners' contrary assertions, the reach of the Court of Appeals' decision is extremely limited. According to the Board of Parole, the Court of Appeals decided that the allegations of Brandon's complaint "are sufficient to state an equal protection claim." (Petition at 6.) That is incorrect. The Court of Appeals stated only that the allegations in Brandon's complaint "can be characterized as presenting a claim under equal protection principles" and that "Brandon's equal protection claim is thus potentially meritorious." (Pet. App. at 6a, 8a & 14a; 734 F.2d at 60-61 (emphasis added).) In the order amending the opinion below (Pet. App. 14a-15a), the Court of Appeals explicitly stated that:

> "We therefore need not and do not hold that the equal protection claim actually states a cause of action to hold that, since it is sufficiently plausible that the claim could state a cause of action, the government must for now prepare at least an answer." (Emphasis added.)

Similarly, the Court of Appeals explicitly chose to "remand Brandon's procedural due process claims without deciding whether those claims state a cause of action." (Pet. App. at 8a; 734 F.2d at 61.) The court first refused to decide whether the D.C. parole statute creates the liberty interest in parole necessary to invoke due process guarantees. (Pet. App. at 9a-10a; 734 F.2d at 61-62.) The court then declined to determine whether any D.C. parole regulations or administrative practices give rise to a protected liberty interest, since further factfinding was required to determine what rules and practices the Parole Board in fact follows and with wnat degree of formality. (Pet. App. at 10a; 734 F.2d at 62.) It sufficed for the Court of Appeals that Brandon's allegations regarding the D.C. statute and administration thereunder raised arguable claims that the district court could not peremptorily cut off by sua sponte dismissal.*/

## REASONS FOR DENYING THE WRIT

1. Understandably, given the procedural posture of the case, the Court of Appeals did not decide the issues on which the Board of Parole now seeks review. Instead, construing 28 U.S.C. § 1915(d), the court merely held that "a [pro se]

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*/In this connection the Court of Appeals, citing Lucas v. Hodges, 730 F.2d 1493 (D.C. Cir. 1984), abstractly stated that customary administrative practices can give rise to a protected liberty interest "at least when they are sufficiently formalized." Although the Parole Board attempts to elevate this statement into a major holding, the statement merely supported the court's conclusion that Brandon's complaint arguably stated a due process claim based on administrative practice. It should be noted that the court subsequently vacated the opinion and judgment in Lucas for mootness. See 738 F.2d 1392 (D.C. Cir. 1984).

complaint need not indisputably state a cause of action to survive sua sponte dismissal; instead, if the complaint has at least an arguable basis in law and fact -- if the complaint is viable -- it cannot be deemed frivolous." (Pet. App. at 5a; 734 F.2d at 59 (emphasis in original).) This unremarkable holding is consistent with this Court's decision in Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam),*/ and follows the decisions of other Courts of Appeals on the meaning of "frivolousness" under 28 U.S.C. § 1915(d). See, e.g., Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983); Holloway v. Gunnell, 685 F.2d 150, 154 (5th Cir. 1982); Boyce v. Alizaduh, 595 F.2d 948 (4th Cir. 1979); Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981). The holding below scarcely requires review in this Court.

2. Even if the Court of Appeals had reached the issues relied on by the Board of Parole, and even if those issues merited review by this Court,**/ it would be premature to address them now. The complaint in this case was dismissed sua sponte, and the Board of Parole has not yet even answered or otherwise pleaded. Thus, there has been no discovery conducted and no evidentiary record created. Yet development of the facts in the district court obviously could significantly affect the legal issues presented, and the lower courts ultimately could dispose of the case in ways obviating any need to address the issues proffered by the Parole Board. In

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*/In Hughes, this Court ruled that a pro se complaint may not be dismissed pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 449 U.S. at 10. Accord, Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam). See also Estelle v. Gamble, 429 U.S. 97 (1976).

**/The D.C. Board of Parole recently proposed extensive amendments to its regulations governing the grant of parole. See 31 D.C. Register 5777 (Nov. 16, 1984).

these circumstances, there is no justification for granting the petition and addressing issues that this Court ultimately may never need to decide, or, at a minimum, that the Court can better decide after a complete record has been developed. See generally Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., dissenting in part) ("[t]he court will not anticipate a question of constitutional law in advance of the necessity of deciding it").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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